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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re SANTIAGO REAL

on

Habeas Corpus.

D061439

(San Diego County  
Super. Ct. No. SCD234688)

Petition for writ of habeas corpus. Relief granted.

On August 4, 2011, Santiago Real pleaded guilty to one count of false imprisonment by violence, menace, fraud or deceit (Pen. Code, §§ 236, 237, subd. (a))<sup>1</sup> for conduct that occurred on June 1, 2011. On October 7, 2011, the trial court sentenced Real to county jail for 16 months under the Criminal Justice Realignment Act of 2011 (Realignment) (Stats. 2011, 1st Ex. Sess. 2011–2012, ch. 12, § 1). (§ 1170, subd. (h).) The trial court also awarded Real 123 actual days of credit, and 60 days of conduct credit, pursuant to the version of section 4019 in effect at the time his crimes were committed.

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<sup>1</sup> All further statutory references are to the Penal Code.

Real contends he is entitled to relief because his sentence to county jail under Realignment denied him conduct credits he would have received had he been sentenced to state prison. He alleges that he is entitled to day-for-day credits under the former version of section 2933, subdivision (e)(1), and that denying him these credits is a violation of the prohibition against ex post facto laws and equal protection. Real further alleges that his expected release date is April 26, 2012. We issued an order to show cause why the relief requested in the petition should not be granted. Respondent concedes that Real is entitled to relief.

### STATUTORY BACKGROUND

In October 2009, the Legislature passed Senate Bill No. 18. Among other changes, it amended section 4019 to allow certain eligible defendants to earn two days of conduct credit for every two days of actual custody. This change became effective January 25, 2010. (Stats. 2009-2010, 3rd Ex. Sess., ch. 28, § 50.)

In September 2010, the Legislature passed Senate Bill No. 76 (SB 76), which again amended section 4019 and also amended section 2933. Under this bill, defendants were eligible for conduct credits at a rate of two days for every six days of actual custody time. (§ 4019, subds. (b) & (c).) These decreased credits were applicable only to defendants who committed crimes on or after the statute's effective date of September 28, 2010. (§ 4019, subd. (g).) SB 76 also added section 2933, subdivision (e)(1), which provided that "a prisoner sentenced to the state prison under Section 1170 . . . shall have one day deducted from his or her period of confinement for every day he or she served in

county jail . . . from the date . . . of arrest until state prison credits pursuant to this article are applicable . . . ."

In April 2011, the Governor signed the Realignment legislation, which, among other things, drastically changed the sentencing options available to trial courts. Realignment allows the courts to sentence defendants convicted of certain felonies, including the crime Real committed, to serve their time in county jail rather than state prison. (§ 1170, subd. (h).)

Also, as part of the Realignment legislation, sections 4019 and 2933 were again amended. Defendants convicted after October 1, 2011, could once again earn two days of credit for every two days served in custody. (§ 4019, subds. (f) & (h).) The Legislature also amended section 4019, subdivision (g), clarifying that the changes made by SB 76 still applies to defendants in custody for crimes committed after the September 28, 2010, effective date of SB 76. (§ 4019, subd. (g).) Also, section 4019, subdivision (h) states that "[a]ny days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." Finally, section 2933, subdivision (e)(1) was deleted.

The overall effect of these changes under Realignment reduces the amount of conduct credits inmates earn who committed their crimes between September 28, 2010 and October 1, 2011, and were sentenced to county jail.

## DISCUSSION

In *Weaver v. Graham* (1981) 450 U.S. 24 (*Weaver*), the United States Supreme Court examined a Florida statutory amendment that changed the amount of "gain-time"

credits an inmate could earn.<sup>2</sup> (*Id.* at p. 26.) Before the amendment, inmates could earn five days per month for the first and second years of the sentence, 10 days for the third and fourth years, and 15 days for the fifth and subsequent years. (*Ibid.*) Under the amendment, inmates could only earn three days per month for the first and second years, six days for the third and fourth years, and nine days for the fifth and subsequent years. (*Ibid.*) Florida applied the amendment to all inmates, including Weaver, whose offense took place before the enactment of the amendment. (*Id.* at pp. 27, 31.)

The Supreme Court concluded that, for inmates who committed crimes before the amendment's enactment, the change in the statute "substantially alter[ed] the consequences attached to a crime already completed, and therefore change[d] 'the quantum of punishment.' " (*Weaver, supra*, 450 U.S. at p. 33.) Because the amendment "constrict[ed] the inmate's opportunity to earn early release, and thereby [made] more onerous the punishment for crimes committed before its enactment," it violated the ex post facto clause. (*Id.* at pp. 35-36.)

Here, the effect on Real of the various Realignment amendments was to preclude him from earning day-for-day credits under the law in effect at the time he committed the crime (former section 2933, subdivision (e)(1)), and instead earn credits at a lower rate. Like the amendment at issue in *Weaver*, "[t]his result runs afoul of the prohibition against

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<sup>2</sup> "Gain-time" credits, which were available to Florida inmates based on satisfactory work and lack of disciplinary violations, are nearly identical to the conduct credits at issue here. (*Weaver, supra*, 450 U.S. at p. 35.)

*ex post facto* laws." (*Weaver, supra*, 450 U.S. at p. 36; U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9.)

Accordingly, we agree with the parties that Real is entitled to relief on *ex post facto* grounds.<sup>3</sup> We direct the superior court to calculate Real's credits consistent with this opinion. (*Weaver, supra*, 450 U.S. at p. 36, fn. 22.) In light of respondent's concession, we need not give this matter plenary consideration. (*People v. Romero* (1994) 8 Cal.4th 728, 740, fn. 7.)

#### DISPOSITION

The requested relief is granted. The superior court shall recalculate Real's credits under the former version of section 2933, subdivision (e)(1), allowing for day-for-day credits, amend the abstract of judgment, and forward a certified copy of the amended abstract of judgment to the San Diego County Sheriff's Department. In the interest of a timely resolution of this matter, this decision shall be final immediately as to this court. (Cal. Rules of Court, rule 8.387(b)(3)(A).)

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

HALLER, J.

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<sup>3</sup> In light of our conclusion that relief is warranted on *ex post facto* grounds, we decline to address petitioner's contention that the denial of day-for-day credits also violates equal protection. (See *In re Martin* (1987) 44 Cal.3d 1, 52, fn. 12.)